INDEX

Page

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3-6

ARGUMENT 6-20

I. This Case Provides No Basis For Explication Of Brady v. Maryland Because Brady Is Completely Inapplicable .. 7-13

A. Twelve state and federal court judges have unanimously found Brady inapplicable hereto 7

B. They were clearly correct in so concluding 7-13

1. There was no "suppression" of evidence by the district attorney 8-11

2. The lack of an expert opinion is not evidence of a "favorable character." 11-12

3. No opinion evidence is not "material" evidence 12-13

II. The Petitioner's Meritless Claims About The District Attorney's Final Arguments Present No Substantial Federal Question And No Reason For Granting Certiorari ... 13-20

A. The district attorney's final arguments did not even contain prejudicial error 14-15

Page

B. Even if there had been prejudicial error, however, no federal question is presented unless the petitioner was deprived of a fair trial in violation of his federal constitutional right to due process of the law 16-19

C. This petitioner was not denied due process of the laws by reason of the content of the district attorney's final arguments 19-20

CONCLUSION 20

CITATIONS

Cases:

Bergenthal v. Cady (E.D. Wis., 1971),
326 F. Supp. 848 1,6

Brady v. Maryland (1963),
373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 4,5,7,8,10,
11,12,13

Bruton v. United States (1968),
391 U.S. 123, 88 S.Ct. 1620,
20 L.Ed. 2d 476 20

Chavez v. Dickson (9th Cir., 1960),
280 F. 2d 727 17,18

Clarke v. Burke (7th Cir., 1971),
440 F. 2d 853, cert. den. 404 U.S. 1039 9,11,13

Gaertner v. State (1967),
35 Wis. 2d 159, 150 N.W. 2d 370 9

Giles v. Maryland (1967),
386 U.S. 66, 87 S.Ct. 793,
17 L.Ed. 2d 737 8

Gollaher v. United States (9th Cir., 1969),
419 F. 2d 520, cert. den. 396 U.S. 960 10

Page

In re Curtis (D.C. D.C., 1941),
36 F. Supp. 408 9

Jessner v. State (1930),
202 Wis. 184, 231 N.W. 634 9

Lutwak v. United States (1952),
344 U.S. 604, 73 S.Ct. 481,
97 L.Ed. 593 20

Moore v. Illinois (1972),
— U.S. —, 92 S.Ct. 2562, — L.Ed. 2d — 8,13

People v. Fisher (1962),
208 Cal. App. 2d 78, 25 Cal. Rptr. 242 9

People v. Jolliff (1964),
31 Ill. 2d 462, 202 N.E. 2d 506 9

Price v. State (1967),
37 Wis. 2d 117, 154 N.W. 2d 222 14

Riley v. Sigler (8th Cir., 1971),
437 F. 2d 258 9,12,13

Sampsell v. People of State of California
(9th Cir., 1951), 191 F. 2d 721,
cert. den. 342 U.S. 929 16,17

State v. Bergenthal (1970),
47 Wis. 2d 668, 178 N.W. 2d 16,
cert. den. 402 U.S. 972 5,6,7,9,11,14,15

State v. Christopherson (1967),
36 Wis. 2d 574, 153 N.W. 2d 631 14

State v. Clarke (1967),
36 Wis. 2d 263, 153 N.W. 2d 61,
cert. den. 393 U.S. 861 9,11

Page

State v. Ruud (1969),
41 Wis. 2d 720, 165 N.W. 2d 153 14

State v. Shoffner (1966),
31 Wis. 2d 412, 143 N.W. 2d 458 3

United States ex rel. Castillo v. Fay
(2d Cir., 1965), 350 F. 2d 400,
cert. den. 382 U.S. 1019 18,19

United States ex rel. Weber v. Ragen
(7th Cir., 1949), 176 F. 2d 579,
cert. dism. 338 U.S. 809, 94 L.Ed. 489,
70 S.Ct. 49 16

United States Constitution:

Fourteenth Amendment 2,15,20

United States Statutes:

28 U.S.C. §1254 (1) 1

United States Supreme Court Rules:

Rule 19 6

Wisconsin Statutes, 1967:

Section 957.11 (1) 3

(2) 3

957.27 3,9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-728

AUGUST K. BERGENTHAL,
Petitioner,

v.

ELMER CADY, Warden of
Wisconsin State Prison,
Waupun, Wisconsin,
Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is contained in Appendix A to the petition herein. The opinion of the United States District Court for the Eastern District of Wisconsin is contained in Appendix B to the petition and is reported in 326 F. Supp. 848.

JURISDICTION

This Court's jurisdiction is sought to be invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I. When the state district attorney did not call a psychiatrist as a witness during the sanity portion of the petitioner's state court bifurcated trial because the psychiatrist had been unable to form an opinion about the petitioner's sanity at the time of the commission of the crimes and when the defense, which was aware that the psychiatrist had been retained by the state after the commencement of the trial, had examined the petitioner and had been present at the sanity portion of the trial, could have done so, did the state trial court's refusal of a defense motion to order the district attorney to disclose whether the psychiatrist had an opinion and, if so, what that opinion was, constitute a suppression by the state of material evidence favorable to the petitioner in violation of the Due Process Clause of the Fourteenth Amendment?

II. Was the content of the district attorney's final arguments to the jury such that the petitioner was denied a fair trial in violation of the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

The petitioner was charged in the Circuit Court of Milwaukee County, Wisconsin, with the crimes of first-degree murder and attempted first-degree murder. These crimes occurred on September 20, 1968. The petitioner entered pleas of not guilty and not guilty by reason of insanity. A bifurcated trial was held before a jury. After the first portion thereof, which lasted twelve days and included six night sessions, the jury found the petitioner guilty of first-degree murder and of endangering safety by conduct regardless of human life.

Thereafter, the sanity portion of the trial commenced. Prior to the trial and in accordance with the then existing Wisconsin law as set forth in *State v. Shoffner* (1966), 31 Wis. 2d 412, 427, 143 N.W. 2d 458, the petitioner filed a written waiver of the provisions of sec. 957.11 (1) and (2), 1967 Wis. Stats., and elected to be tried under the American Law Institute definition of insanity. This choice placed the burden of proof on the insanity issue on the petitioner.

The petitioner hired and was examined by twelve psychiatrists. He had also been examined by three psychiatrists who had been appointed by the court as impartial expert witnesses in accordance with and under the provisions of sec. 957.27, 1967 Wis. Stats. A psychiatric evaluation was also made by Dr. William J. Crowley, a psychiatrist who subsequently, after the commencement of the trial, had been retained by the state and at its request sat through the sanity portion of the trial assisting the district attorney.

At the commencement of the seven-day and five-night sanity portion of the trial, the defense presented the testimony of three of the twelve psychiatrists it had hired. Each of these testified that in his opinion the petitioner was insane at the time of the commission of the crimes under the ALI

definition of insanity. The three impartial court-appointed psychiatrists thereafter testified. Each of them stated that in his opinion the petitioner was sane at the time of the commission of the crimes under the ALI definition of insanity.

After the defense had rested and before the testimony of the impartial experts appointed by the court, the state had an opportunity to present evidence on the sanity issue. It chose not to do so.

When the state rested without calling any witnesses, defense counsel, outside the presence of the jury, made an oral motion to the court and indicated that he would be reducing that motion to writing. Defense counsel pointed out that Dr. Crowley, whom he described as an experienced and astute expert witness of the highest professional integrity, had been retained by the state after the commencement of the trial, that he had sat through the sanity portion of the trial and that he had not been called by the state as a witness. Defense counsel moved for an order of the court compelling the district attorney to disclose why Dr. Crowley had not been called as a state's witness, whether Dr. Crowley had an opinion on the sanity of the petitioner at the time of the commission of the crimes and, if so, what that opinion was. Defense counsel argued that he had a right to such information on the basis of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215, and the ethical responsibilities of a prosecuting attorney. The district attorney indicated that he had no objection to an *in camera* discussion between Dr. Crowley and the court. The court, however, decided that it would reserve its ruling until it had received and considered the written motion of defense counsel.

The trial before the jury continued with the testimony of the impartial expert witnesses. Before that testimony was

completed, the written motion was received and ruled on by the court. The court, finding that *Brady v. Maryland,* supra, was inapplicable and that the district attorney had no ethical obligations to call witnesses because the defense wanted him to, refused to order the district attorney to answer the questions posed by defense counsel. The court indicated that the defense was free to call Dr. Crowley as a witness if it desired to do so. The defense also asked that it be allowed to call Dr. Crowley adversely on the basis of a statute relating to civil actions only. The trial court, and subsequently the Supreme Court (47 Wis. 2d 668, 688), held that the statute involved was completely inapplicable to criminal actions.

The defense did not call Dr. Crowley.

After the defense and the state rested, oral arguments were made and the court instructed the jury. The jury found that the petitioner was not insane at the time of the commission of the crimes.

The defense made motions after verdict and during the course of them the district attorney revealed that he had not called Dr. Crowley as a witness because Dr. Crowley had been unable to form an opinion to a reasonable medical certainty on the petitioner's sanity at the time of the commission of the crimes. Petitioner's Appendix E, which is an affidavit subsequently procured by the defense from Dr. Crowley, also so indicates. The trial court denied the motions after verdict and judgment was entered. The petitioner was sentenced to life imprisonment on the first-degree murder conviction and to not more than five years imprisonment on the conviction for endangering safety by conduct regardless of human life.

The petitioner appealed from the judgment of the circuit court to the Wisconsin Supreme Court. He asserted many alleged errors to that court, including the two raised in this petition. The Wisconsin Supreme Court unanimously affirmed the judgment. *State v. Bergenthal* (1970), 47 Wis. 2d 668, 178 N.W. 2d 16. A motion for rehearing was made and denied.

Thereafter, a petition for certiorari to the Wisconsin Supreme Court was filed with this Court. In *that* petition the questions now raised in *this* petition were not even presented. Certiorari was denied. 402 U.S. 972.

Prior to the denial of certiorari, a petition for a writ of habeas corpus was filed with the United States District Court for the Eastern District of Wisconsin. Petitioner's Appendix C. The multiple claims made to the district court included the two contained in this petition. The district court denied the petition for a writ of habeas corpus, finding that the claims here presented were meritless and did not entitle the petitioner to relief. Petitioner's Appendix B and *Bergenthal v. Cady* (E.D. Wis., 1971), 326 F. Supp. 848.

The petitioner appealed the denial of his petition by the district court to the United States Court of Appeals for the Seventh Circuit. On August 16, 1972, that court affirmed the district court. Petitioner's Appendix A.

ARGUMENT

There is no reason why certiorari should be granted in this case. None of the considerations governing review on certiorari as set forth in Rule 19 of the United States Supreme Court Rules here exist.

I. This Case Provides No Basis For Explication Of Brady v. Maryland Because Brady Is Completely Inapplicable.

The petitioner asserts that certiorari should be granted because this case affords an opportunity to explain and expand upon the holding in *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215. It does not. *Brady* is completely inapplicable to the fact situation here presented.

A. Twelve state and federal court judges have unanimously found Brady inapplicable hereto.

The state trial court judge, both on the original trial motion and on motions after verdict, found *Brady* inapplicable. The seven justices of the Wisconsin Supreme Court so found. 47 Wis. 2d 668, 687, 688.* The federal district court judge rejected the petitioner's *Brady* argument as did the three judges of the United States Court of Appeals for the Seventh Circuit. Appendix B, p. 25, and Appendix A, p. 19. All were unanimous and all were correct.

B. They were clearly correct in so concluding.

In *Brady,* Justice Douglas, expressing the views of the majority of the court, wrote (373 U.S. 87):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

---

*There is no mention of *Brady* in the opinion, but *Brady* was argued as a basis for the claim of error rejected by the Wisconsin Supreme Court on pages 687, 688 of its opinion.

Brady was subsequently discussed by this Court in *Giles v. Maryland* (1967), 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 2d 737, and in the recent case of *Moore v. Illinois* (1972), — U.S. —, 92 S.Ct. 2562, — L.Ed. 2d —. In *Moore* the opinion of the Court was delivered by Justice Blackmun. He explained the *Brady* holding by writing (92 S.Ct. 2562, 2568):

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct in Moore's case is to be measured."

In order for *Brady* to apply to the present case, (a), (b) and (c) listed above must all exist. Here none of them do.

1. There was no "suppression" of evidence by the district attorney.

At the time defense counsel moved that the trial court order the district attorney to reveal why he had not called Dr. Crowley as a state's witness and what, if any, opinion Dr. Crowley had on the sanity of the petitioner at the time of his commission of the crimes, defense counsel knew that Dr. Crowley had examined his client; he knew that after the commencement of the trial the state had retained Dr. Crowley; he knew that Dr. Crowley had sat through the sanity portion of the trial; he knew that Dr. Crowley was not called as a state's witness and he knew Dr. Crowley, whom he described to the trial court as an "experienced and astute expert witness" "of the highest professional integrity."

The defense has no right to demand that the state call any particular witness. *Gaertner v. State* (1967), 35 Wis. 2d 159, 166, 150 N.W. 2d 370; *People v. Fisher* (1962), 208 Cal. App. 2d 78, 25 Cal. Rptr. 242; *People v. Jolliff* (1964), 31 Ill. 2d 462, 202 N.E. 2d 506. As pointed out by the Wisconsin Supreme Court in this case, the state chose to rest on the sanity issue without calling any witnesses and, "It had a right to do so." *State v. Bergenthal* (1970), 47 Wis. 2d 668, 688, 178 N.W. 2d 16, cert. den. 402 U.S. 972.

Instead of calling any expert witnesses, the state, in pursuit of justice, was willing to and did place its reliance on the testimony of the three impartial expert witnesses appointed by the court. These witnesses owed no duty or allegiance to either side. *Jessner v. State* (1930), 202 Wis. 184, 231 N.W. 634; *State v. Bergenthal* (1970), 47 Wis. 2d 668, 684, 178 N.W. 2d 16, cert. den. 402 U.S. 972. See also, sec. 957.27, 1967 Wis. Stats. The three impartial expert witnesses all testified that, under the ALI test of insanity, the petitioner was sane at the time of the commission of the crimes.

In order for the district attorney to "suppress" evidence, that evidence must be unknown or unavailable to the defense. Here, the defense knew that Dr. Crowley could be called as an expert witness and he was available to be called by the defense, if it so desired. Under these circumstances, the trial court correctly found that the district attorney had not "suppressed" any evidence. Cf: *In re Curtis* (D.C. D.C., 1941), 36 F. Supp. 408; *State v. Clarke* (1967), 36 Wis. 2d 263, 279, 280, 153 N.W. 2d 61, cert. den. 393 U.S. 861, and *Clarke v. Burke* (7th Cir., 1971), 440 F. 2d 853, cert. den. 404 U.S. 1039. See also, *Riley v. Sigler* (8th Cir., 1971), 437 F. 2d 258, in which it was held that an FBI report was not "suppressed" when the existence of the report was known by the accused.

A claim comparable to that made in this petition was presented and rejected in *Gollaher v. United States* (9th Cir., 1969), 419 F. 2d 520, cert. den. 396 U.S. 960. In *Gollaher*, it was asserted that there was a *Brady* violation because the government did not call at the trial two witnesses (Knapton and Morgan) who had testified before the grand jury. The defense, despite its request, was not permitted to see the grand jury testimony of those witnesses. It argued that since the government did not call the witnesses at the trial there was an implication that their testimony would have been helpful to the defense. The defense did not desire to call them as defense witnesses for fear that they could be impeached by use of their grand jury testimony. The federal district court and the Ninth Circuit Court of Appeals found *Brady* to be inapplicable to that state of facts. The court of appeals, p. 527, wrote:

> "Appellants were in a much different position in this case. *They could have called Knapton and Morgan to testify.* Brady could not have called Boblit to testify for Boblit had a right to refuse to be called. Further, it is apparent that Brady and his attorney were deceived. This is not true in the present case. *Appellants knew where to find the testimony they felt may have been helpful in their defense and could have used it subject to the risk of impeachment."* (Emphasis added.)

Here also the defense knew where to find the testimony that it allegedly thought might have been helpful to it. The defense could have called Dr. Crowley as its witness. It chose not to because it did not wish to be bound by the testimony of an expert, whom it described as a man "of the highest professional integrity." The district attorney did not "suppress" any evidence. The existence of that evidence was known to and available to the defense, just as

was the testimony of the nine remaining psychiatrists who had been hired by the defense and were not called by it to testify. On this subject see the comment of the Wisconsin Supreme Court in *State v. Bergenthal* (1970), 47 Wis. 2d 668, 688, 178 N.W. 2d 16, cert. den. 402 U.S. 972.

2. The lack of an expert opinion is not evidence of a "favorable character."

On motions after verdict, the district attorney revealed that he did not call Dr. Crowley as a witness because Dr. Crowley was unable to form and had no opinion on the sanity of the petitioner at the time of the crimes. Appendix A, p. 18; *State v. Bergenthal* (1970), 47 Wis. 2d 668, 687, 688, 178 N.W. 2d 16, cert. den. 402 U.S. 972. See also, Appendix E, p. 37.

The federal district court found in this case that there had been no "suppression by the prosecution of evidence favorable to an accused." Appendix B, p. 25. The federal circuit court of appeals found that "neutral or no opinion evidence" is not "favorable evidence" within the meaning of the due process guarantees of *Brady* and related cases. Appendix A, p. 19.

These holdings are obviously correct and this Court has previously denied certiorari in comparable types of cases. See for example, *Clarke v. Burke* (7th Cir., 1971), 440 F. 2d 853, cert. den. 404 U.S. 1039, and *State v. Clarke* (1967), 36 Wis. 2d 263, 153 N.W. 2d 61, cert. den. 393 U.S. 861. In both *Clarke* cases the claim was made that there was a *Brady* violation. The state called the victim and another witness to testify. Each of them identified the accused as the rapist. It did not call two other persons, who had been nearby. Neither of these persons could identify the accused as the rapist, but neither of them could testify that he was

not the rapist. All the courts involved found no *Brady* violation because the evidence was not "favorable" to the accused and, further, found that the evidence had not been "suppressed" since the witnesses who did testify mentioned the existence and presence of the other persons near the scene of the crime.

Another comparable case is *Riley v. Sigler* (8th Cir., 1971), 437 F. 2d 258. In that case the clothing of the accused was submitted to the FBI lab for analysis of certain smudges. The state did not allow inspection of the FBI report and it was claimed that this constituted a *Brady* violation. The report merely stated that the smudges were too limited for significant chemical analysis. The report was noncommittal and inconclusive, just as the testimony of Dr. Crowley would have been noncommittal and inconclusive if he had been called to testify by either the state or the defense. The failure to disclose the content of the FBI report was held not to be a violation of *Brady* since that evidence was not "material" and not "favorable to the accused."

3. No opinion evidence is not "material" evidence.

The sole issue during the sanity portion of this trial was whether petitioner was insane at the time he murdered Russell Wirth and shot Mrs. Mary Wirth. There is no way that an expert's inability to form an opinion can be considered material or relevant to the issue of sanity. The only basis on which the expert can be a witness is that he is an expert and *has* an opinion. His reasons for indecision, or his observations and conclusions in reaching his impasse, or his belief that other experts are better equipped than he to express an opinion, become irrelevant and immaterial to the issue in the absence of the formation and expression of an opinion.

Petitioner argues that Dr. Crowley could have testified that, in his opinion, the petitioner was candid and not malingering. This is clearly immaterial when the issue is sanity, not credibility. Further, Dr. Crowley is an expert on mental diseases and not a lie detector or expert on credibility.

Dr. Crowley's testimony was not "material evidence." *Moore v. Illinois* (1972), — U.S. —, 92 S.Ct. 2562, — L.Ed. 2d —; *Clarke v. Burke* (7th Cir., 1971), 440 F. 2d 853, cert. den. 404 U.S. 1039; *Riley v. Sigler* (8th Cir., 1971), 437 F. 2d 258.

The present case, in which the district attorney "suppressed" no evidence and the evidence involved was neither "favorable" to the petitioner nor "material" to the only issue involved, i.e., sanity, affords no opportunity for this Court to explain *Brady*. There is no reason to grant certiorari for that purpose.

II. The Petitioner's Meritless Claims About The District Attorney's Final Arguments Present No Substantial Federal Question And No Reason For Granting Certiorari.

The trial of this case was long, complicated and exhausting. There were final arguments by the district attorney and defense counsel on both the issue of guilt and, over a week later, on the issue of sanity. In this petition for certiorari is found a potpourri of out-of-context words and phrases apparently uttered by the district attorney at various times, on various subject matters and during various of his final arguments. The complaints in the petition about the collected words and phrases are sometimes contradictory, sometimes

silly, and at all times are both legally meritless and incapable of being evaluated as to truth, completeness or effect by this Court, which will not on this requested review have available to it the 3211-page transcript of the trial.

A. The district attorney's final arguments did not even contain prejudicial error.

The final arguments of the district attorney in this case consisted of the opening and closing final argument on the issue of guilt and a final argument on the issue of sanity. Defense counsel did make a few objections during the course of these arguments. Some of these objections were sustained and prompt remedial action taken by the trial court. Others were overruled. At no time, however, did the petitioner's very competent, aggressive and imaginative team of three Wisconsin trial lawyers make a motion for a mistrial, even though that motion is almost automatically made if there is any basis for asserting that a remark of a district attorney was such as to deprive the defendant of a fair trial. In Wisconsin, failure to make a motion for a mistrial before the jury returns with its verdict is a waiver of complaints of impropriety in the final arguments of counsel. *State v. Christopherson* (1967), 36 Wis. 2d 574, 583, 153 N.W. 2d 631; *Price v. State* (1967), 37 Wis. 2d 117, 134, 135, 154 N.W. 2d 222; *State v. Ruud* (1969), 41 Wis. 2d 720, 727, 165 N.W. 2d 153.

On motions after verdict, defense counsel claimed to the trial court that 100 errors had occurred. 47 Wis. 2d 668, 673. Among these was a claim that prejudicial error, *not* a deprivation of due process, had occurred during the final

arguments of the district attorney. The trial court, which is the court in the best position to evaluate claims "in view of the totality of the circumstances," found no merit in this assertion.

On appeal to the Wisconsin Supreme Court it was argued by petitioner that prejudicial error had occurred during the final arguments of the district attorney. It was *not* argued, however, that these alleged errors were so serious and devastating that they denied the petitioner a fair trial and, therefore, due process of the law as guaranteed by the Fourteenth Amendment. The Wisconsin Supreme Court, which had the complete record before it, found that the arguments of the district attorney on the subject of the heinous nature of the crimes and the weaknesses of certain defense arguments fell "well within the outer limits of the leeway given counsel in this area." 47 Wis. 2d 668, 682. On the subject of expressions of opinions by the district attorney, the Supreme Court found that, "If error there was, it was cured" and pointed out that the defense had made no motion for a mistrial. 47 Wis. 2d 668, 682.

After affirmance of his conviction by the Wisconsin Supreme Court and denial of a motion for rehearing, a petition for certiorari was filed with this Court. In it, the petitioner did not even bother to raise either of the "questions presented" in this petition. Certiorari was denied. 402 U.S. 972.

As found by the state courts, the final arguments of the district attorney did not contain any prejudicial error.

B. Even if there had been prejudicial error, however, no federal question is presented unless the petitioner was deprived of a fair trial in violation of his federal constitutional right to due process of the law.

A petition for a writ of habeas corpus was filed by this petitioner with the federal district court. At that juncture the question ceased to be whether prejudicial error occurred during the final arguments of the district attorney and became whether any errors, which did exist, were so serious and overwhelming that the petitioner was thereby deprived of a fair trial and, therefore, of life, liberty or property without due process of law.

The United States Court of Appeals for the Seventh Circuit, in *United States ex rel. Weber v. Ragen* (7th Cir., 1949), 176 F. 2d 579, cert. dism. 338 U.S. 809, 94 L.Ed. 489, 70 S.Ct. 49, held:

> "* * * The United States District Court does not sit in habeas corpus proceedings to review errors of law in the state courts. It sits only to determine whether or not the proceedings in the state court amount to a violation of federal constitutional rights. Lyons v. State of Oklahoma, supra, 322 U.S. 605, 64 S.Ct. 1213, 88 L.Ed. 1481. * * *"

In *Sampsell v. People of State of California* (9th Cir., 1951), 191 F. 2d 721, cert. den. 342 U.S. 929, improper remarks of a state prosecutor in argument to a jury were cited by a *habeas corpus* petitioner as proof that he was being held in custody in violation of the federal Constitution. The court first observed (191 F. 2d at 725):

"* * * The control by this court over criminal trials in state courts is more limited than our review of a criminal proceeding in the federal district courts. Malinski v. New York, 1945, 324 U.S. 401, 411, 65 S.Ct. 781, 89 L.Ed. 1029."

Exercising this limited power of review, the court in *Sampsell* framed the issue to be resolved in the following language:

"The issue in this type of proceeding is not whether the statements of the district attorney deprived petitioner of trial by jury, see Palko v. Connecticut, 1937, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288, but whether his conviction was the result of an unfair trial, Adamson v. California, 1947, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, and therefore deprived him of life, liberty, or property without due process of law. United States Constitution, Amendment XIV, Section 1." (191 F. 2d at 725).

The court, applying the foregoing standard, held that there was "nothing in the ill considered remarks of the district attorney that could move a federal court to hold, *over the judgment of the state Supreme Court,* that the trial was unfair to the point of violating the Fourteenth Amendment to the Constitution of the United States or in violation of any other section of that charter. * * *" (Emphasis supplied.)

In a more recent decision involving a claimed deprivation of constitutional right by virtue of improper argument, the Court of Appeals for the Ninth Circuit elaborated upon the standard to be applied by federal courts in such cases. Having assumed that error had intervened during the course of the state prosecutor's argument, the court in *Chavez v. Dickson* (9th Cir., 1960), 280 F. 2d 727, held, at p. 735:

"But even if such remarks could have been so interpreted, or assuming that the impropriety of the remarks in any other respect had been raised and should have been sustained, no prejudice resulted which has constitutional significance. It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court interference is warranted. Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166. In our opinion the remark of the prosecution quoted in footnote 12 did not result in a denial of fundamental fairness essential to the concept of justice."

United States ex rel. Castillo v. Fay (2d Cir., 1965), 350 F. 2d 400, cert. den. 382 U.S. 1019, involved a claim that a remark of the prosecutor in final argument was a denial of due process. In rejecting this claim that court wrote, p. 401:

"But whatever error the state court may have committed in failing to grant a new trial, the defect in the trial did not attain constitutional proportions. The prosecutor's conduct did not create a situation so prejudicial to appellant that he was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment.

" 'The speeches of counsel for defendants apparently provoked statements by the District Attorney of which petitioners now complain. This does not raise a due process question.

" 'As we have recently said, "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a

demonstrable reality." ' Buchalter v. New York, 319 U.S. 427, 431, 63 S.Ct. 1129, 1132, 87 L.Ed. 1492 (1943), quoting Adams v. U.S. ex rel. McCann, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

"Conduct of state prosecutors which it was contended was unfair and prejudicial has consistently been held on collateral attack in the federal courts to fall short of constituting a lack of due process. [citations omitted]."

C. This petitioner was not denied due process of the laws by reason of the content of the district attorney's final arguments.

The federal district court here found that there was no error at all, let alone the overwhelming error required for a violation of the federal guarantee of due process. It wrote:

"* * * I have examined those statements [the allegedly inflammatory and prejudicial statements of the prosecutor before the jury] and agree with the state supreme court's conclusion that the arguments were within the 'limits of the leeway given counsel.' 47 Wis. 2d at page 682, 178 N.W. 2d at page 24." (Appendix B, p. 25, 26).

The United States Court of Appeals for the Seventh Circuit, whose decision is the subject of this request for review, concluded:

"* * * We cannot say, over the judgment of the state Supreme Court and the federal trial court, that these statements were of such gravity as to constitutionally deprive petitioner of a fair trial. *See Sampsell v. People of California*, 191 F. 2d 721, 725 (9th Cir. 1951), *cert. denied*, 342 U.S. 929 (1952)." (Appendix A, p. 20).

The Due Process Clause of the Fourteenth Amendment requires a fair trial, not a perfect one. *Lutwak v. United States* (1952), 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593; *Bruton v. United States* (1968), 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed. 2d 476. This petitioner, as found by the federal courts involved and as recognized by the petitioner's trial counsel, who made no motion for a mistrial and who at no time alleged a violation of due process to the state trial court, the state supreme court or to this Court, was not deprived of the fair trial required by the Due Process Clause because of the content of the district attorney's final arguments. Any errors which did occur were nonprejudicial and had no federal constitutional dimension. No substantial federal question is raised by the petitioner's Argument II.

CONCLUSION

There is no reason for granting certiorari in this case and the petition therefor should be denied.

Respectfully submitted,

ROBERT W. WARREN
Attorney General of Wisconsin

BETTY R. BROWN
Assistant Attorney General of Wisconsin

Attorneys for Respondent

114 East, State Capitol
Madison, Wisconsin 53702

December 8, 1972